86-1165

Supreme Court
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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Sarah M. Goostree, Petitioner,

v.

Montgomery County Quarterly Court, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIROARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the pre-selection of an applicant for a job prior to the advertisement of the position and review of other applicants' qualifications renders the employer's reasons a pretext for discrimination as a matter of law.

Whether the explanation given by the employer is pretextual based upon the evidence of pre-selection, and higher qualifications of Petitioner.

Whether, in a situation where more than one reason motivates an employer to reject an application and plaintiff has made a showing of sex as one motivating factor, employer should be required to prove the same results would be reached absent the discriminatory factor.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit which was submitted for publication appears in Appendix A, infra. The opinion of the United States District Court for the Middle District of Tennessee, which is unreported, is reprinted in Appendix B, infra.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit affirmed the findings of the district court on July 17, 1986. Petitioner filed a Petition for Rehearing En Banc which was denied on September 15, 1986. This Petition for Certiorari is filed within the time permitted.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

This lawsuit grew out of the failure of the Montgomery County Quarterly Court Nursing Home Committee to select Mrs. Sarah M. Goostree as the Administrator of the Home on September 7, 1977.

On September 6, 1978, Mrs. Goostree filed a complaint against the State of Tennessee, Montgomery County, the Montgomery County Quarterly Court, the Court Nursing Home Committee, Arthur Hunt, Mercer McKinney, Lorenza Collier (all members of the committee), George Watson (administrator for the Tennessee Board of Licensure of Health Care Facilities), William Beach, Mike Allen, Raymond Jarrell (the former administrator) and Don Van Meter (the new administrator), pursuant to 28 U.S.C. §§ 1331, 1343(3), 42 U.S.C. §§ 1983, 1985(3). On February 22,

1979, the district court dismissed the State of Tennessee, George Watson and Lorenza Collier from the case.

Trial was held in December 1980 at which time testimonial and documentary evidence was submitted to the court. The evidence clearly showed that a position as administrator of the Home was to become vacant because of the retirement of Jarrell on October 1, 1977. On August 2, 1977 an advertisement for the vacancy was placed in the local newspaper. Deadline for applying was August 12, 1977.

Petitioner and Van Meter were two of the individuals who applied for the job. Van Meter had previously been the assistant to Jarrell and was allegedly pre-selected for the vacant position. Back on July 21, 1977 the committee changed the guidelines for qualifications of the new administrator. The new guidelines merely required a person to be in the process of obtaining a Nursing Home Administrator License. In

addition, one must be able to obtain a Water and Waste Water License, a license only Van Meter could obtain without waiting a full year.

Other testimony showed that Jarrell had made statements about the position being "a man's job." In addition, the new guidelines required the administrator to assist the personnel of maintenance and as the committee stated "be willing to get his hands dirty." This was not part of Jarrell's job in the past and merely appears to be tailored for Van Meter.

The district court found for the defendants on December 23, 1980 in respect to the claims under 42 U.S.C. §§ 1983 & 1985(3). On May 31, 1984, the court found for the defendants on the Title VII claim. This case was then appealed to the United States Court of Appeals for the Sixth Circuit where it was affirmed on July 17, 1986. After a denial of Petitioner's request for rehearing, this Petition for Certiorari was filed.

REASONS FOR GRANTING THE WRIT

I. THE REASONS GIVEN BY THE EMPLOYER WERE PRETEXTUAL AS A MATTER OF LAW AND FACT.

A. The pre-selection process operates as a pretext for discrimination as a matter of law.

The Court of Appeals for the Sixth Circuit found that "Van Meter was pre-selected." In fact, the Court stated:

> We agree with Goostree that the evidence clearly suggests that Van Meter was pre-selected. This fact casts serious doubt on the credibility and legitimacy of the committee's proffered reasons for selecting Van Meter.

It is petitioner's contention that under the case in other circuits if Van Meter's pre-selection attacks the credibility of the committee's reasons for choosing Van Meter over Goostree then such reasons are pretextual and petitioner should prevail in this action.

This Court set forth the burden of proof in Title VII disparate treatment cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The plaintiff must first establish a prima facie case of discrimination. This may be done by proving (1) that he belongs to a minority; (2) that he applied for a job for which he was qualified and the employer was seeking applicants; (3) that he was rejected despite his qualifications; and (4) that after his rejection, the employer continued to seek applicants with plaintiff's qualifications. Id. at 802.

Next, the employer is entitled to respond to the prima facie case by either (1) challenging the facts plaintiff used to establish his case; or (2) presenting a "legitimate nondiscriminatory reason" for plaintiff's rejection. Id. at 802. In the latter situation, plaintiff has the opportunity to rebut the employer's explanation. It is plaintiff's task to prove the reason given is mere pretextual.

The district court and the Court of Appeals both agreed that Petitioner established a prima facie case of discrimination. As stated before, the Court of Appeals interpreted the evidence to mean that Van Meter was pre-selected for the position due to his friendship with certain members of the selection committee. Further, the Court of Appeals held "a patronage system that relies on family, friends, and political allies" is not in violation of Title VII.

In Coble v. Hot Springs School District No. 6, 682 F.2d 721 (8th Cir.1982), a female teacher was denied a promotion to an administrative position. She filed a Title VII action and at trial presented a prima facie case of discrimination. The school district set forth a legitimate, nondiscriminatory reason for her rejection. The Court held as a matter of law that the evidence of pre-selection effectively discredited the school district's explanation. Id., at 729.

It is well settled that pre-selection and other means of informal placement heavily influenced by subjective factors are condemned as a tool for discrimination. Stallworth v. Shuler, 777 F.2d 1431, 1434 (11th Cir.1985). In fact, the Sixth Circuit has even held in a pre-selection case that absolute discretion over employment decisions where subjective prejudice may control is no longer consistent with our law. Abrams v. Johnson, 534 F.2d 1226, 1231 (6th Cir.1976).

In International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), the Court stated:

> Although the McDonnell Douglas formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one. (Emphasis added)

Id. at 358 n. 44. Such explanation must be sufficient to overcome the inference of discrim-

ination. The explanation given in this case is that Van Meter is more qualified for the position than Petitioner. Without addressing the truthfulness of this proposition, petitioner wishes to point to a fallacy in such an argument. If Van Meter was pre-selected for the position prior to the formal selection proceedings, then the committee never addressed the issue of qualification. Therefore, such an explanation can only be a pretext for discrimination.

The Court in E.E.O.C. v. Safeway Stores, Inc., 634 F.2d 1273 (10th Cir.1980), was faced with a similar situation where an assistant was pre-selected to replace a retiring worker. The Court stated:

> It cannot be said that there was no opening. Otherwise, it would be very easy to evade the Act. All one would have to do would be to appoint an understudy to lock him in. Plainly, this cannot be allowed to be a cover-up of a violation of the Act.

Id. at 1281. The same rationale can be applied to the pre-selection cases as a whole. One situation is where the present administrator or

committee believes certain applicants are not qualified because of race or sex. To avoid the possibility of their employment, the administrator pre-selects a person for the position and tailors the job to fit his qualifications, before advertising the position. At that point, the administrator can argue that the pre-selected individual is more qualified for the position. This makes a farce of the purpose of the Act. Such appears to be the present case.

In 1974, an assistant position was created to train a replacement for Jarrell.[1] Van Meter was the third man hired for the position.[2] As a matter of fact, correspondence from Van Meter

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1. Judy Azarro Graham, who was a member of the selection committee in 1974, testified to this point. Main Tr. 1219-1222.

2. Testimony of Jarrell. Main Tr. 819.

shows that he was the heir-apparent in 1976.[3]

Just like the position in Hartman v. Wick, 600 F.Supp. 361 (D.C.1984), the job was tailored to fit Van Meter. In Hartman, the Court held that the pre=selection of men on three occasions to fulfill a position compel a conclusion that the agency's reasons were a mere pretext for discrimination. Id. at 365. The same can be true in our case. The assistant administrator position was created to train a replacement for Jarrell on his retirement. All three individuals selected for the position and therefore pre-selected as the future administrator were men.

Petitioner points to the Guidelines for the

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3. Van Meter's July 19 letter established he was selected in 1976 to replace Jarrell: "On August 2, 1976, I was employed as the assistant administrator for the . . . home. It was the intention of the facility and myself at the time of employment, to train me to replace the present administrator, Mr. Raymond Jarrell, on his retirement. Plaintiff's Tr. Exh. 31. Van Meter's July 19 Letter to Mr. Watson.

job to demonstrate how much the position was tailored to fit Van Meter's qualifications. First, the Policy Manual[4] required the administrator to have a license as required by the State. The guidelines[5] passed during a July 21, 1977 meeting between Hunt, McKinney, Jarrell, and Van Meter requires only that the person be "in the process" of obtaining a Nursing Home Administrator License. The reason for this change is that Van Meter did not have his license and could not obtain the license prior to the date he would assume the position. Petitioner had her license prior to the October 1, 1977 deadline.

Another change is that the July 21 Guidelines required a Water and Waste Water License. Only Van Meter had sufficient experience to meet state requirements. Petitioner would have to

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4. Plaintiff's Tr. Exh. 141, Policy Manual, Administrator Job Description.

5. Plaintiff's Tr. Exh. 80, July 21 minutes.

work at the Home for one year before she could obtain the license. This requirement, in effect, eliminated all other potential applicants. Only eleven of the 216[6] homes in Tennessee had a waste water facility where one could get the year of experience and only two[7] of all the Administrators licensed in Tennessee were also licensed operators.

The rationale behind the Administrator being a licensed Water and Waste Water Facility operator was to save the Home almost $55 per month. The same is true of the new requirement that the administrator have knowledge in plant maintenance to assist the personnel in plant maintenance. This would save about $60 per month. If the committee is contending that they hired Van Meters to save the Home money, it seems illogical. By hiring Van Meter the Home had to

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6. James Poff, Main Tr. 1170.

7. James Poff, Main Tr. 1170-1171.

pay (1) Jarrell's consulting fee of $2,191.21;[8] (2) the expense to enlarge the Administrator's home since Van Meter has five children . . . $20,000;[9] and (3) $12,862.88[10] for an assistant for Van Meter since he had no experience dealing with patients.[11] The total cost was over $35,053.40. Under the committee's budget plans, it would take 24 years to recoup the money lost from hiring Van Meter over Petitioner.

It appears that the whole explanation of Van Meter's selection was merely a few "good old boys" covering for one another. To ignore this situation is to condone the "southern good old boy" system with all its prejudice against minorities. Petitioner cannot believe that this Court

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8. Plaintiff's Tr. Exh. 80, Sept. 24 Minutes.

9. Van Meter Main Tr. 1322.

10. Van Meter's September 23 Letter to Allen. Submitted post injunction hearing appendix pages 171-72, filed 9/5/80.

11. Van Meter Main Tr. 1293.

will allow the committee members and Jarrell to hide behind a practice that breeds discrimination in order to avoid liability under Title VII. Such an idea is absurd.

For the reasons stated above, the selection process made the explanation of the committee pretextual as a matter of law. Therefore, it is important that the Court grant certiorari in this case as it appears that this Circuit is in conflict with the other Circuits as is evident by the case law presented herein.

B. The Court of Appeals should have found the explanation of the committee pretextual based upon the evidence.

From reading the lower court's opinion, the Petitioner would have to show direct evidence of discrimination to prevail. In addition to the direct evidence that Petitioner provided showing

Jarrell strongly believed the position of administrator was a man's job[12] and the only way to acquire the position was to work as Jarrell's assistant, Petitioner contends that she can prove her claim by indirect evidence.

Direct evidence is not needed to prove a claim under Title VII. United Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983); King v. Palmer, 778 F.2d 878 (D.C.Cir.1986). A plaintiff can prove his case indirectly by showing the explanation given by employer has no credence. Aikens at 715; Texas Department of Community Affairs v. Burdein, 450 U.S. 248, 256 (1981). Examination of the facts reveals that the district court was wrong in not holding

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12. When Petitioner first contacted Jarrell about the position in May of 1977, she was told by Jarrell that it was a "man's job." Goostree Nov. 20 Excerpt Tr. 45-57.

Jarrell advised Lawrence Edge, the assistant in 1975, that the position of Administrator was a man's job. Lawrence Edge Main Tr. 1195-1197, 1208-1909.

that the reasons of the committee were pretextual.

In Anderson v. City of Bessemer City, ___ U.S. ___, 105 S.Ct. 1504 (1985), the Court held that the clearly erroneous standard of review is appropriate on appeal. Fed. R. Civ. P. 52(a) states:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness.

This is not the case where the findings of fact are prepared by one party and not the court. In the present situation, there was a three and one-half years delay in the decision. The District Court made and had no notes and no transcript to use in reaching his decision. And credibility findings were a verbatim rendition of the employer's proposed Findings of Fact and Conclusions of Law. Under the circumstances, the Court should take a critical view of the district court's findings. E.E.O.C. v. Federal Reserve Bank of Richmond, 698 F.2d 633, 639-642 (4th

Cir.1983), rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984).

Evidence presented at trial proved that Van Meter was an old Army buddy of McKinney, one of the committee members. In fact, McKinney recommended Van Meter to Jarrell for the assistant position knowing that he would be pre-selected for the position as administrator.[13] Then the job was tailored to fit his qualifications. Supra.

In reality, Petitioner was the best person for the job. She had her license, which was required by the State, and 30 months of administrator experience in Louisiana. Van Meter had no license and less than one year of experience. As stated before, he had no experience with patients. As assistant, he worked primarily with

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13. Judy Azam Graham, Main Tr. 1223-1224, 1227-1228. Plaintiff's Tr. Exhs. 13 & 14, Van Meter's Two Applications for Assistant P.

the maintenance personnel. As stated before, an assistant had to be hired to help Van Meter.

Jarrell, McKinney, Hunt and Van Meter were aware of Van Meter's lack of qualifications. This is especially apparent when one examines the advertisement of the position. The ad appeared on a Tuesday for one day in the Clarksville Leaf Chronicle, which had a circulation limited to the area immediately around Clarksville, Tennessee. Deadline for applications were 10 days later. It is obvious the committee did not want many applicants to apply. Why should the committee want to read numerous applications? The new administrator was already selected. In fact, he was not notified of the results of the committee's vote. I guess he already was aware of the outcome before the vote.

Therefore, the facts show that the reasons given by the committee for rejecting the petitioner's application was pretextual for discrimination. Under the circumstances, the Court should grant

certiorari and reverse the Court of Appeal's findings.

II. EMPLOYERS SHOULD BE REQUIRED UNDER TITLE VII MIXED MOTIVE CASES TO PROVE THE OUTCOME WOULD BE THE SAME ABSENT DISCRIMINATORY INTENT.

The problem that the Court of Appeals has with the present case is that there exist a mixture of motives behind Petitioner being rejected for the Administrative position. First, she is a woman and second, Van Meter is a part of the "good old boy" system with two of the committee members.

The court did not understand that sex does not have to be the sole reason for the rejection. This sole basis approach has been rejected on several occasions. Fitzgerald v. Sirloin Steakhouse, Inc., 624 F.2d 945 (10th Cir.1980); Barnes v. Costle, 561 F.2d 983, 990 (D.C.Cir.1977).

The best solution to mixed motive cases under Title VII is to require the employer to prove he would have made the same decision even if the illegal discrimination was absent. Zimmer and Sullivan, The Structure of Title VII Individual Dispute Treatment Litigation: Anderson v. City of Bessemer City, Inferences of Discrimination and Burdens of Proof, 9 Harv. Women's L. J. 25, 47 (1986). This approach was adopted by the Court in a First Amendment case, Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). It should be expanded to Title VII cases.

Therefore, since Petitioner has proven sex was a factor, the case should be remanded to determine if the employer can prove Van Meter would have been chosen if Petitioner was a man. This is an issue which must be addressed by the court to clarify the mixed motive in Title VII cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-5752 & 84-5869

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SARAH M. GOOSTREE,
Plaintiff-Appellant (84-5752),
Plaintiff-Appellee (84-5869),

v.

STATE OF TENNESSEE, et al.,
Defendants,

MONTGOMERY COUNTY,
TENNESSEE,
Defendant-Appellant (84-5869),

MONTGOMERY COUNTY
QUARTERLY COURT, et al.
Defendants-Appellees (84-5752).

ON APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed July 17, 1986

Before: ENGEL, CONTIE and RYAN, Circuit Judges.

CONTIE, Circuit Judge. Sarah M. Goostree, plaintiff, and Montgomery County, Tennessee, defendant, appeal from orders of the district court entering judgment in favor of defendants on Goostree's complaint alleging sex discrimination in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and

EDITOR'S NOTE

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the civil rights statutes, 42 U.S.C. §§ 1983, 1985, and denying defendant's motion for costs. For the reasons that follow, the judgment of the district court is affirmed in part and reversed in part.

I.

On September 6, 1978, Sarah M. Goostree filed a complaint against the State of Tennessee, Montgomery County, the Montgomery County Quarterly Court, the Court Nursing Home Committee, Arthur Hunt, Mercer McKinney, Lorenza Collier, George Watson, William O. Beach, Mike Allen, Raymond F. Jarrell, and Don R. Van Meter asserting jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3), 42 U.S.C. §§ 1983, 1985(3). Hunt, McKinney and Collier were members of the Quarterly Court and nursing home committee, over which Beach presided. Watson was administrator for the Tennessee Board of Licensure of Health Care Facilities. Allen was the personnel director of Montgomery County. Jarrell was the administrator of the Montgomery County Nursing Home for twenty years prior to the events giving rise to this action. Don Van Meter was an assistant administrator at the home under Jarrell, and was appointed to replace Jarrell. In Count I, Goostree alleged that she was told by Jarrell, when she inquired about the administrator's position at the nursing home, that "the Administrator should be a man, and, further, that he was at that time training a man for the job." Goostree alleged that the selection process was discriminatory in violation of the Fourteenth Amendment and 42 U.S.C. § 1983. In Count II, Goostree alleged violation of 42 U.S.C. § 1985(3), and, in Count III, alleged violation of 42 U.S.C. § 1986. Counts IV through VI alleged pendent state claims. On February 22, 1979, the district court dismissed the State of Tennessee and George Watson from the case. Defendant Collier was also dismissed from the case with prejudice.

Trial was held in December 1980 at which the following testimonial and documentary evidence was adduced.

The advertisement for the administrator position ran in the August 2, 1977 Clarksville Leaf Chronicle and indicated applications would be accepted until August 12. The ad read:

> Applicants must possess or be in the process of obtaining an Administrator's license from the State of Tennessee. This position requires top administrative and supervisory ability. Experience in nursing home or hospital administration desired.

Don Van Meter's letter of July 19, 1977 to George Watson indicated "[i]t was the intention of the facility and myself, at the time of employment, to train me to replace the present administrator." The remainder of the letter reflects Van Meter's belief unequivocally that he would be the next administrator and that he was seeking permission to be licensed temporarily on behalf of the committee. On September 2, after Van Meter's call of September 1, Watson wrote that "[t]he Board of Licensing Health Care Facilities will accept an interim administrator, who is pursuing the obtaining of a license for a reasonable time provided the nursing home continues to operate in a satisfactory manner."

The minutes of the July 21, 1977 committee meeting attended by Hunt and McKinney set out the following five guidelines for hiring a new administrator.

1. Possess or be in the process of obtaining a Nursing Home Administrator License from the State of Tennessee.
2. Possess or be in the process of obtaining a Water and Waste Water License from the State of Tennessee.
3. Ability and experience in Nursing Home Administration. (Accounting and budgeting procedures, supervision of personnel, hiring and terminating personnel, maintaining federal and state nursing home standards, bids and contracts procedures.)

4. Knowledge in plant maintenance, to assist and advise maintenance personnel in plant maintenance.

5. Provide security for the Nursing Home at all times.

The August 18 minutes indicate that the committee reviewed the five applications for the job, and McKinney moved that three be selected for interview. Goostree, Slaughter, and Van Meter were selected. At the August 25 meeting Goostree and Van Meter were interviewed, and two voted for Van Meter, and one for Goostree. On September 7, after voiding the selection of Van Meter, the committee interviewed Goostree, Van Meter, and two other candidates, and selected Van Meter unanimously. At the September 29 meeting, the committee agreed to employ Jarrell as consultant for three months and to enlarge the administrator's home to accommodate Van Meter's family.

A roster of the home's employees effective September 7, 1977, indicated that only ten percent (6 of 65) of the employees were men. Of course, men, Van Meter and Jarrell, held the two highest paying positions at the home.

Michael Allen, assistant to Judge Beach, testified that he told the nursing home committee that Goostree had reported that she was a licensed administrator in Tennessee and had given Allen her license number. Allen indicated that the newspaper advertisement for the position had been published on August 2, with a deadline of August 12, for a position to be open on October 1. The time lag between the deadline and opening of the position was to allow time to decide on a candidate. Allen recalled that the retention of Jarrell as consultant was discussed at a September 7 meeting regardless of who served as administrator. Allen testified that "until he [Van Meter] had actually been issued his license there would have to be an interim administrator, someone with a license who would serve on one or two days a week, something like

that, as a requirement to fill the regulation that requires a licensed administrator." Allen testified that this would be similar to a consultant. Allen testified that the opinion at the September 7 meeting was that if the new administrator was not yet licensed, "a consultant would be mandatory," but that a consultant would be a good idea even if the administrator was licensed. Allen was told by Van Meter that Van Meter had been cleared by the state to serve as administrator without a license in July 1977. Allen testified that further investigation into the state licensing requirement was precluded by George Watson's letter indicating that the state would not oppose a temporarily unlicensed administrator.

Donald E. Bankey testified that he applied for the administrator's position and was interviewed. Bankey testified that Jarrell had indicated that he was grooming his assistant for the administrator's job.

Judge Beach testified that Van Meter was the best applicant. Each interview on September 7 was about thirty minutes and all applicants were asked the same questions. Beach indicated that he told Goostree that he did not think that the committee would necessarily want a man for the job. At the interview, Van Meter informed the committee of the letter from the state and that he could serve as administrator until he received his license. Beach testified that he was unsure whether it was mandatory to have Jarrell as a consultant prior to issuance of Van Meter's license.

Lorenza Collier, a member of the nursing home committee, testified that she believed the guidelines developed by Hunt and McKinney for hiring a new administrator were good, but that having a license by October 1 was not essential. Collier never heard anything said about the administrator's job being a man's job. Collier initially voted for Goostree at the first selection, but changed her vote after the second interview to make Van Meter's selection unanimous. Collier had moved at the August 30 meeting that the selection of Van Meter be set aside and that reinterviews be made. Collier also

testified that on September 7 she was unaware that Jarrell would be a consultant.

Lawrence Edge, an assistant administrator at the nursing home, testified that Jarrell told him that a woman could not run the nursing home.

Plaintiff Goostree testified that in May 1977 she contacted Jarrell about the administrator position at the home and was told that a man was needed for the job because the home was in a rural area and that Jarrell was training a man for the job. Goostree contacted Hunt and was encouraged to meet other members of the committee and express her interest in the job. Goostree talked to Mercer McKinney who assured her that there was no politics involved in the administrator decision. Goostree did not talk to Collier, but talked to Beach who assured her that the process would be conducted fairly.

Goostree testified that when she learned that Van Meter had been selected she went to see Beach because she knew Van Meter did not have a license. Beach told Goostree he would ask the committee to set aside the selection and reinterview. Goostree testified that she then heard that Van Meter had received permission to serve as administrator until he was licensed. Goostree, who had served as a nursing home administrator in Louisiana, testified that the committee's questions about wandering patients and mechanical skills telegraphed the impression that it was looking for a man. Goostree indicated that she had some experience in budgeting as an administrator for a nursing home and in completing Medicaid reports. Goostree testified that she had heard a rumor that she was denied the job because of a drinking problem.

Goostree had been in charge of delinquent accounts for Christian Home for the Aged, and denied testimony that she had treated two black male orderlies in a demeaning manner. Goostree testified that tension between herself and Tommy

Kay, her supervisor at the home, arose because of her expressions of dissatisfaction with Kay's management ability. Goostree did not list this experience on her application because she did not believe that it was relevant work experience. Goostree testified that she could administer the Montgomery County Nursing Home without an assistant or a consultant.

Judy Graham testified that she had been a member of the nursing home committee when the assistant administrator position was created. The position was created in hopes of maintaining continuity after Jarrell's retirement, but that no guarantee of promotion was made. Graham testified that McKinney and Van Meter were old Army buddies.

Arthur Hunt testified that on July 21, 1977 he met with Mercer McKinney to develop guidelines for the administrator's job. Van Meter and Jarrell were not present. The guidelines were developed from the Montgomery County Nursing Home policy manual. The manual provided that the administrator must fulfill the state license requirement, but this was changed to require that an applicant be in the process of obtaining a license in order to accommodate out of state applicants. The new guidelines also required the administrator to formulate policy and procedure relative to the security of the home and its patients. Hunt testified that Van Meter performed better than Goostree in the September 7 interview. Hunt testified that "after the last interview someone said something about her drinking problem out in the community." Hunt testified that the revised guidelines for the administrator were not tailored for a man. Hunt testified that there was no understanding that Van Meter was hired and trained to replace Jarrell.

Hunt testified that the maintenance requirement in the guidelines and the waste water license requirement did not cause Goostree not to be selected. None of the candidates had waste water licenses. Administrator licensing was not a factor since Goostree had her license and Van Meter had the

letter from George Watson. Hunt voted for Van Meter because of education, army experience, letters of recommendation, and experience at the nursing home. Goostree had less education, and had only 2 1/2 years of experience as a nursing home administrator. Sex was never discussed as a criterion. Hunt testified that the issue of a consultant first came up at the September 29 meeting and that Jarrell would have been hired as a consultant regardless of who was hired as an administrator.

Raymond Jarrell denied telling Goostree in early 1977 that the administrator's job was a man's job. Jarrell served as consultant from October 1, 1977 until January 2, 1978. Jarrell was asked about the consultant position soon after he announced his intention to retire.

Tommy Kay, an administrator at the Christian Home for the Aged in Texas, testified that Goostree was employed at the home from January to May, 1977 as Kay's administrative assistant. Kay fired Goostree because of complaints about her treatment of family members and black employees.

Michael Lutche, who worked with the state office of Local Classification Compensation Services, testified that his office had developed definitions and qualifications for the Montgomery County nursing home administrator. Lutche testified that waste water license was not included in the requirement because it was rare to find an administrator with such a license.

Mercer McKinney testified that the committee developed guidelines for selection of an administrator. McKinney interpreted the reference in the guidelines to security to require the administrator to develop policies on security and not to personally provide for security. The security requirement did not require a man. The purpose of broadening the license requirement to consider applicants in the process of getting their license was to avoid limiting applicants to Tennessee residents. The waste water license requirement was added

to the guidelines because of Jarrell's past practice with the license. The purpose of the waste water license requirement was to save the home money. McKinney thought in July 1977 that the license was easy to obtain and did not know that one year of experience at a waste water plant was required prior to taking the examination. The guideline on plant maintenance was meant to hire someone capable of supervision not to require that the administrator perform maintenance on his own. The administrator was to assist the home maintenance man in order to save money.

McKinney denied telling Goostree that the administrator's job was a man's job. McKinney testified that stability, administrative ability and personnel ability were important traits in the candidates. McKinney voted for Van Meter due to more work experience and better reference letters. Van Meter's answers were more to the point while Goostree's were evasive. That Van Meter had worked at the home was a factor in the selection. McKinney could not recall discussion of Jarrell as consultant prior to September 29, 1977. The hiring of Jarrell was to provide a smooth transition and would have been appropriate regardless of who was hired as administrator.

Don Van Meter testified that he wrote to Watson to determine whether he could even compete for the administrator's position. Van Meter testified that he did not tell Watson that licensed applicants were available. Van Meter admitted that he would not have been able to apply for the position except for the "in the process" language in the guidelines with respect to the licensing requirement. Van Meter called George Watson on September 1, and sought some reply to his request to be temporarily licensed. Van Meter indicated that no one asked him to call Watson.

George Watson, chief of the licensing section of the Tennessee Licensing Board for Health Care Facilities, testified that he informed Van Meter by letter of September 2, 1977 that the home would not be in non-compliance with state

law if an unlicensed individual acted as administrator on an interim basis. The Board had allowed such unlicensed practice in the past. Van Meter did not tell Watson that there were licensed applicants for the position.

Jerry Wilson, Goostree's supervisor at Beauregard Nursing Home, testified that he asked Goostree to resign because of problems with accounts receivable, the cleanliness of the home, care of the residents, and rapport of Goostree with the residents.[1]

Mary Woodall testified that Jarrell had offered her the assistant administrator position. Woodall declined for personal reasons. Woodall wrote a letter of recommendation for Van Meter.

On December 23, 1980, the court entered judgment on the jury's verdict with respect to the claims based on 42 U.S.C. §§ 1983, 1985(3) in favor of defendants. On May 31, 1984, the district court entered judgment for the defendants on Goostree's Title VII claim. The court found that "[m]uch of the plaintiff's employment experience has little relevance to nursing home administrator." The court found that Goostree had not proven discrimination under a disparate impact theory. Under a disparate treatment theory, the court found that plaintiff had established her prima facie case and that the defendants had proffered a legitimate non-discriminatory reason for Van Meter's selection, prior experience and successful performance. With respect to pretext, the court found:

> The defendants relied on Watson's opinion in order to comply with state and federal licensing requirements and not to accomplish some discriminatory purpose. Clearly, Van Meter was actively pursuing

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[1]It is clear that the testimony of Tommy Kay and Jerry Wilson with respect to Goostree's past performance was not available to the committee, and, accordingly, cannot be considered as support for the committee's decision not to hire Goostree.

> obtaining his license and because of his satisfactory performance at the Home and prior experience, the defendants chose to hire Van Meter pending the results of the licensing exam.

On June 11, 1984, Goostree moved for a new trial. On July 2, 1984, the defendants sought costs pursuant to Fed. R. Civ. P. 54(d), 28 U.S.C. § 1920, and 42 U.S.C. § 1988. Defendants sought costs for court reporters, copying, preparation of exhibits, fees for witnesses, depositions, air fare for impeachment witnesses, and expenses in locating witnesses, totaling $7,498.89. The motion for a new trial was denied on July 6, 1984. On August 23, 1984, the court denied the motion for costs, and found that "plaintiff's unsuccessful civil rights petition was [not] frivolous in nature." Goostree and the County appeal.

II.

Goostree contends that Van Meter was preselected for the administrator position, and that, therefore, the committee's contention that Van Meter was selected based on his prior experience and qualifications is necessarily a pretext for sex discrimination. After the plaintiff has established her prima facie case and defendants have articulated a legitimate non-discriminatory reason for not hiring Goostree,

> [a]t that point, the presumption of discrimination "drops from the case" [*Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981)] and the District Court is in a position to decide the ultimate question in such a suit: whether the particular employment decision at issue was made on the basis of race. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 253. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff regarding the particular employ-

> ment decision "remains at all times with the plaintiff," *ibid.*, and in the final analysis the trier of fact "must decide which party's explanation of the employer's motivation it believes." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. at 716.

Henry v. Lennox Industries, Inc., 768 F.2d 746, 750 (6th Cir. 1985) (quoting, *Cooper v. Federal Reserve Bank of Richmond*, 104 S. Ct. 2794, 2799 (1984)). Further,

> [i]n establishing pretext, the plaintiff "may succeed . . . either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. It is clear that the plaintiff need not introduce new evidence regarding pretext. "[T]here may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Id.* at 255 n.10. Further, "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant." *Aikens*, 103 S. Ct. at 1482.

Id. at 750-51.

"[W]e recognize that the desire to hire a more qualified applicant is the basis for a legitimate business decision especially [as in this case] when management is involved, . . . and that the fact that the court finds that the employer misjudged the qualifications of its applicants does not expose such employer to Title VII liability." *Id.* at 751. Likewise, "the legitimacy of the articulated reason for the employment decision is subject to particularly close scrutiny where the evaluation is subjective." *Grano v. Department of Development of*

City of Columbus, 699 F.2d 836, 837 (6th Cir. 1983); *Henry*, 768 F.2d at 751. Evidence of preselection operates to discredit the employer's proffered explanation for its employment decision. *Coble v. Hot Springs School District No. 6*, 682 F.2d 721, 728-29 (8th Cir. 1982); *EEOC v. Safeway Stores, Inc.*, 634 F.2d 1273, 1281 (10th Cir. 1980), *cert. denied*, 451 U.S. 986 (1981); *United States v. Wattsburg Area School District*, 429 F. Supp. 1370, 1378 (W.D. Pa. 1977). *See also Abrams v. Johnson*, 534 F.2d 1226, 1229-30 (6th Cir. 1976); *Hartman v. Wick*, 600 F. Supp. 361, 364 (D. D.C. 1984). Preselection, of course, does not violate Title VII when such preselection is based on the qualifications of the preselected party and not on some basis prohibited by Title VII. *Kennedy v. Landon*, 598 F.2d 337, 341 (4th Cir. 1979). However, preselection is relevant evidence of the employer's motivation.

Our review of the factual conclusions of the district court is rather circumscribed.[2]

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[2]Pursuant to Fed. R. Civ. P. 52(a), "we review the district court's findings of fact for clear error." *Henry v. Lennox Industries, Inc.*, 768 F.2d 746, 749 (6th Cir. 1985).

> There are no distinctions between ultimate and subsidiary findings of fact, the predominant issue of intent in Title VII cases is factual, and the deferential standard of Fed. R. Civ. Pro. 52 does not apply to questions of law. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). In *Anderson v. City of Bessemer City*, ___ U.S. ___, 105 S. Ct. 1504, 1511 (1985), the Court reiterated that a reviewing court may only overturn the district court's findings when the court "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). "The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court." *Anderson*, 105 S. Ct. at 1511.
>
> > If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.

We agree with Goostree that the evidence clearly suggests that Van Meter was preselected. This fact casts serious doubt on the credibility and legitimacy of the committee's proffered reasons for selecting Van Meter. However, there is little evidence from which to conclude that sex was the basis for this preferential treatment. We have recently stressed the difference between a hiring process that proceeds based on legally impermissible distinctions between candidates and a "patronage system that relies on family, friends, and political allies." *Avery v. Jennings*, 786 F.2d 233, 237 (6th Cir.), *cert. denied*, 54 U.S.L.W. 3840 (June 23, 1986). The defendants are not subject to liability on a Title VII claim if they hired Van Meter based on such criteria not prohibited by Title VII. We, of course, defer to the district court with respect to matters of credibility and sustain the district court's findings if we find such plausible. While the evidence in this case is conflicting, and subject to variable interpretations, we cannot say that the district court clearly erred in finding that the defendants did not act with a statutorily prohibited animus in rejecting Goostree for the job.

III.

Goostree requested the following instruction:

> If any defendant has carried the burden of showing a legitimate, nondiscriminatory reason why plaintiff was not selected for the position, you shall nevertheless find that defendant guilty of sex discrimination if plaintiff has shown, by a preponderance of the evi-

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Id. at 1512. Further, "[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.*

Id. at 750.

> dence, either (1) that the defendant's stated reason is a pretext, or false reason, or (2) that notwithstanding the legitimate, nondiscriminatory reason for not selecting plaintiff, the defendant did not give plaintiff's application the full consideration it warranted, wholly or partially because of her gender (sex). Thus, if sex was a factor in the failure to hire plaintiff, a female, then you must find sex discrimination occurred, regardless of whether the male who was hired, defendant Van Meter, was more qualified.

The district court declined to give this instruction but instructed as follows:

> If you find that defendants gave a legitimate nondiscriminatory reason for hiring Don Van Meter, then the plaintiff has the opportunity to show that the defendants' stated reason is in fact a pretext. The burden of persuasion remains with the plaintiff.
>
> If you find, however, from the preponderance of the evidence that plaintiff was not hired because she was a woman, then such refusal to hire would not be lawful exercise of the defendants' authority and would be a violation of plaintiff's civil rights.

Goostree's contention is that the district court erred in refusing to give the "sex as a factor" instruction.[3]

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[3]Defendant contends that plaintiff has not properly preserved the alleged error in the challenged instruction for appeal. Fed. R. Civ. P. 51 provides that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict. . . ." Rule 51 "does not require formal objections," but "is satisfied only if it is clear that the judge was made aware of the possible error in or omission from the instructions." *Gradsky v. Sperry Rand Corp.*, 489 F.2d 502, 503 (6th Cir. 1973). Further, "[t]he court, insofar as the instructions were covered by the appellant's proposals . . . , was aware of the appellant's objections to the charge as given." *Id.* Goostree claims that the district court specifically refused to include her proposed instruction, and that she is not barred from asserting such as error on appeal. Under *Gradsky*, the propriety of the instruction is properly raised.

Causation in the Title VII context is an elusive concept.[4] The Court has not held "that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies; . . . no more is required to be shown than that race was a 'but for' cause." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976); *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 709 (6th Cir. 1985). "This 'but for' causation is satisfied when the plaintiff establishes that the defendant's discriminatory intent more likely than not was the basis of the adverse employment action." *Id.* The *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) evidentiary framework incorporates both the questions of motivation and causation. "The very showing that the defendant's asserted reason was a pretext for race is also a demonstration that but for his race plaintiff would have gotten the job." *Bibbs v. Block*, 778 F.2d 1318, 1321 (8th Cir. 1985) (*en banc*).

The district court in this case properly instructed on the *McDonnell Douglas/Burdine* standards. Goostree has never suggested that this is a dual motive case or a case in which direct evidence of discrimination is available, thereby making the application of *McDonnell Douglas* inappropriate. *See Blalock, supra; Bibbs, supra.* The mere showing that "sex was a factor" rather than a "but for" factor is insufficient to establish liability under Title VII. Accordingly, the court did not err in declining to deliver the contested instruction.

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[4]We recognize that:

> A plaintiff who alleges disparate treatment by a state employer is bringing essentially the same claim under Title VII as under § 1983. If there is liability under Title VII, there should be liability under § 1983. Similarly, if there was no discriminatory intent, there cannot be liability under either Title VII, on a disparate treatment theory, or § 1983.

Grano v. Department of Development, 637 F.2d 1073, 1082 (6th Cir. 1980).

IV.

Defendants sought to recover several costs in this case. Fed. R. Civ. P. 54(d) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."

28 U.S.C. § 1920 provides in pertinent part:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case.

We have recently considered the applicable standards in reviewing a district judge's denial of costs to a prevailing party.

> The rule establishes a norm of action: prevailing parties are entitled to their costs as of course. Departures from the rule are permitted; however, "when rules prescribe a course of action as the norm but allow the district court to deviate from it, the court's discretion is more limited than it would be if the rule were nondirective." *Coyne-Delany*, 717 F.2d 385, 392 (7th Cir. 1983).
>
> Before the district court, "it is incumbent upon the unsuccessful party to show circumstances sufficient to overcome the presumption" favoring an award of costs to the prevailing party. *Lichter*, 269 F.2d

> at 146. Before the appellate court, however, the party seeking reversal of a discretionary denial of costs must show that the district court committed a error in applying the criteria of this court.

White & White, Inc. v. American Hospital Supply Co., 786 F.2d 728, 731-32 (6th Cir. 1986). Costs may properly be denied "where taxable expenditures by the prevailing party are 'unnecessary or unreasonably large,' "where the prevailing party should be penalized for unnecessarily prolonging trial or for injecting unmeritorious issues," or where the case is " 'close and difficult.' " *Id.* at 730. "The closeness of a case is judged not by whether one party clearly prevails over another, but by the refinement of perception required to recognize, sift through and organize relevant evidence, and by the difficulty of discerning the law of the case." *Id.* at 732-33. An inappropriate factor to consider is "the ability of the prevailing party to pay his or her costs." *Id.* at 730. We have also held that "[t]he good faith of unsuccessful litigants is a relevant consideration in Rule 54(d) deliberations. Good faith without more, however, is an insufficient basis for denying costs to a prevailing party." *Id.* at 731.

The district court apparently considered the defendants' motion as solely brought pursuant to § 1988. The prevailing party in a civil rights action, however, is in the same position as any other prevailing party with respect to costs available pursuant to 28 U.S.C. § 1920. *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624, 640 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). The district court denied costs because Goostree's case was not frivolous. In light of our decision in *White & White*, this is clearly an incorrect standard.

In light of the many factual findings that are required in assessing and calculating an award of costs, we remand the case to the district court to apply the standards set out in *White & White*, and, more specifically, in 28 U.S.C. § 1920.

in determining the extent to which an award of fees is appropriate.

Accordingly, the judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED to the district court for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

SARAH GOOSTREE	)	
	)	
VS.	)	DOCKET NO. 78-3372
	)	
STATE OF TENNESSEE; MONTGOMERY COUNTY QUARTERLY COURT; MONTGOMERY COUNTY QUARTERLY COURT NURSING HOME COMMITTEE; WILLIAM O. BEACH; ARTHUR HUNT; MERCER McKINNEY; LORENZA COLLIER; MIKE ALLEN; RAYMOND F. JARRELL; DON R. VANMETER and GEORGE WATSON	)	

MEMORANDUM

This action complaining of sex discrimination was brought in 1978 pursuant to 42 U.S.C. §§ 1983, 1985(3) and 1986, and also invoked pendent jurisdiction over state law claims of breach of contract, tortious interference with right to pursue livelihood, and fraud. Plaintiff demanded a jury trial. On February 22, 1979, this Court, through Judge Thomas Wiseman,

dismissed the suit against the State of Tennessee and dismissed the counts alleging violations of 42 U.S.C. §§ 1985 and 1986, breach of contract, tortious interference with livelihood and fraud against defendant George Watson. Two days prior to trial, on November 17, 1980, the complaint was amended to add an action that the defendants violated Title VII of the Civil rights Act of 1964, 42 U.S.C. § 2000(e), et seq. Plaintiff dismissed the Title VII claim against the State of Tennessee, George Watson, Arthur Hunt, Mercer McKinney, Lorenza Collier, Mike Allen, Raymond Jarrell, Don R. VanMeter and Judge William O. Beach, individually but not in his official capacity. Plaintiff also dismissed her breach of contract claim as to all parties. The lawsuit was dismissed in its entirety as to Lorenza Collier.

The remaining claims were: (1) an alleged 42 U.S.C. § 1983 violation by all remaining defendants for refusal to hire plaintiff because of

her sex; (2) alleged violations of 42 U.S.C. § 1985(3) and 42 U.S.C. § 1986 by all remaining defendants except George Watson; (3) state law allegations of tortious interference with plaintiff's pursuit of her livelihood and fraud against all remaining defendants except George Watson; and (4) alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq., for discrimination in hiring due to gender by Judge William O. Beach in his official capacity as County Executive, Montgomery County Quarterly Court, and the Montgomery County Quarterly Court Nursing Home Committee.

A jury trial began on November 19, 1980 and with interruption by the Court for another judicial assignment, continued through December 23, 1980. At the conclusion of the plaintiff's proof, the Court granted defendant Watson's motion for a directed verdict and the 42 U.S.C. § 1983 case was dismissed as to him. Acting upon the remaining defendants' motions for directed

verdicts, the Court dismissed the state law claims of fraud and tortious interference with pursuit of livelihood and the claims arising under 42 U.S.C. 1986. The Court also dismissed the 42 U.S.C. § 1983 claim against defendant Van-Meter, and dismissed the § 1983 and § 1986(3) suit against Judge William O. Beach, individually and in his official capacity, and against Montgomery County.

At this point in the lawsuit there remained the § 1983 allegations against the Quarterly Court, the Nursing Home Committee, Hunt, McKinney, Allen and Jarrell and the Title VII action against Judge Beach in his official capacity as County Executive, the Quarterly Court and the Nursing Home Committee. On December 23, 1980, the jury returned a verdict in favor of all remaining defendants on all counts except the Title VII claim which has been reserved by the Court for disposition. In June 1982, and in September 1983, attorneys for the parties

submitted "Proposed Findings of Fact and Conclusions of Law" as requested by the Court on the Title VII claim.

The Court now makes its findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure and based upon the testimony of the witnesses, the exhibits introduced into evidence, the statements and briefs of counsel and the entire record in this cause.

I.

The plaintiff, Sarah Goostree, is a female resident of Montgomery County, Tennessee. The defendant, Montgomery County Nursing Home (Home), is an indigent care nursing home located in a rural area of Montgomery County (County). It is owned and operated by the County through the Nursing Home Committee (Committee). The members of the Committee are members of the Board of County Commissioners. The Board of

Commissioners is a popularly elected governing body of the County and at all relevant periods of this controversy was known as the Montgomery County Quarterly Court (Quarterly Court). The Quarterly Court names three of its members to be responsible for the operation of the Home. During the relevant period, the Committee responsible for the Home was composed of Arthur Hunt, who served as Chairman, Ms. Lorenza Collier and Mercer McKinney. Defendant Judge William O. Beach was County Executive during the relevant period. In that capacity he had certain administrative and fiscal responsibilities for the County government as well as presiding over the Quarterly Court. Defendant Mike Allen was the County personnel officer under the direct supervision of Judge Beach. Defendant Raymond Jarrell was the administrator of the Home from September 1957 until his retirement on October 1, 1977. Defendant Don R. VanMeter was hired as assistant administrator of the Home

in 1976 and became administrator on October 1, 1977. He resigned in September 1980.

There were approximately sixty-five employees working at the Home in 1977, of whom approximately sixty were female. There were thirteen supervisors, ten of whom were female. The five male employees were Jarrell, the administrator, who lived in a residence on the premises, the assistant administrator, Charles Hartley, a male nurse, and two maintenance men. The Home operated a waste water/sewage treatment facility on the premises, which Home employees performed all minor maintenance.

The administrator had the overall responsibility for the Home. He was responsible for seeing that the patients were properly cared for, that a budget was prepared and that the physical plant and equipment was properly maintained. He was also responsible for the hiring of new personnel. The Home was heavily dependent on Medicaid funding for patient care because

the Quarterly Court only provided funds for capital improvements.

The position of assistant administrator was created in 1975. Jarrell attempted to hire a female for that position who was then serving as the Nurse Consultant for the Home. She declined the appointment. There was some turnover in the job until VanMeter was hired in 1976.

Because of health problems, Jarrell submitted his letter of resignation to Judge Beach on June 30, 1977, to be effective on October 1, 1977. At this point it became the responsibility of the three member committee to select a new administrator. The Home's policy Manual, prepared by Jarrell and necessary for state inspections, listed the following specifications for the administrator's position:

> Must fulfill license requirement for this state. Advance training in hospital or nursing home administration through workshops and institutes. Sound knowledge of personnel administration. Knowledge of nursing and medical practices and procedures, laws

> pertaining to hospital or nursing home administration. Ability to make independent decisions. Knowledge of local economic conditions and ability to adjust cost of operation to meet community ability to pay for services. Ability to keep abreast of changes in nursing home field. Ability to deal with and supervise professional personnel.

In 1976, the Office of Local Classification and Compensation Services of the Tennessee State Personnel Department prepared a Classification and Compensation study of all jobs in Montgomery County. The study contained this description for the administrator of the Home:

> Must be licensed by the State of Tennessee as a nursing home administrator and must possess any combination of training and experience equivalent to graduation from a four year college or university with a major in hospital administration, public or business administration or a related field. Five years of responsible hospital-type experience of which two years must have been in a responsible supervisory capacity such as assistant administrator or other major functional department head position.

The study and the job description were not binding upon the County.

Federal law required that the State of Tennessee adopt standards for the licensing of

nursing home administrator in all intermediate care homes receiving federal funds. 42 U.S.C. § 1396. The Home was an intermediate care facility covered by this provision. Pursuant to this provision, the Tennessee Legislature enacted TENN. CODE ANN. §§ 63-16-101, et seq., which established the Tennessee State Board of Examiners for Nursing Home Administrators. The Tennessee Legislature declared in section 63-1611 (1974) of Tennessee Code Annotated, now codified as Tennessee Code Annotated § 63-16-111, that:

> It shall be unlawful for any person to . . . practice as a nursing home administrator or offer to practice unless he is duly licensed and registered to so practice under the provisions of this chapter.

The Board is authorized to determine the scope, content and format of the examinations. The Board may authorize issuance of a license without examination to any person holding a current license from another state, so long as the standards of licensing of that state are at

least equivalent to those of Tennessee. Although the Board of Examiner examines and certifies qualified applicants, the licenses are actually issued by the Tennessee Healing Arts Licensing Board. At the time Jarrell tendered his resignation in June 1977, VanMeter was not licensed as an administrator by the State of Tennessee.

The Committee met on July 27, 1977 to prepare guidelines for the selection of the new administrator. Lorenza Collier was not present at this initial meeting, but later ratified the guidelines. Mike Allen, the personnel officer, was present. The Committee was not aware of the existence of either the "personnel specifications" that had been prepared by Jarrell or the job description prepared and recommended by the State of Tennessee. The guidelines for the Administrator position prepared by the Committee provided that applicants have the following qualifications: 1) be licensed as an administrator

[or] be in the process of being licensed; 2) be licensed as a Tennessee Water and Waste Water operator or be in the process of being licensed; 3) have ability and experience in nursing home administration; 4) have knowledge of plant maintenance; and 5) be able to provide security for the Home at all times. Allen was directed to advertise the position.

When the plaintiff learned about Jarrell's resignation, she began to seek the position. Although her residence was in Louisiana at the time, she happened to be in Montgomery County, where she was born, attending a family reunion when she heard of the impending vacancy at the Home. At that time she was licensed as an administrator by the State of Louisiana and had some twenty-one months of experience as an administrator at three different Louisiana nursing homes.

When this action arose in 1977, Ms. Goostree was sixty-five years old. She was educated in

the public schools of Montgomery County and in 1936 married Eddie Goostree, a successful talent scout for the Detroit Tiger baseball club, who died in 1963. At the time of his death he was responsible for a specific area, the center of which was Shreveport, and the plaintiff lived there with him. They had left Montgomery County in 1959 or 1960.

Much of the plaintiff's employment experience has little relevance to nursing home administration. She was not employed outside the home during the last ten years before her husband died, but did assist her husband in compiling and recording a variety of statistics on large numbers of prospective major league baseball players. Earlier in their marriage they had lived in Florida and she had several different jobs. From 1945 until 1950, she worked four months out of the year, during the baseball season, as a secretary-receptionist in a doctor's office. She performed such duties as making out

appointments, filling out forms and taking blood pressure. From 1960 until 1964, while living in Shreveport, she worked in the home office of the local Congressman. In that position she clipped newspaper articles, handled constituent inquiries and drafted response letters.

After the death of her husband, the plaintiff became interested in nursing home administration and enrolled in appropriate courses at Louisiana State University and later at Bogier City Community College. Her grades were not very good and the entire time she attended LSU she was on scholastic probation for poor class attendance. Between 1971 and 1974 Ms. Goostree managed to obtain forty hours of credit from the two institutions plus another 20 hours of credit from a continuing education program. This qualified her to take the examination in Louisiana for an administrator's license that she received in 1974. In August 1974, she was hired as the administrator of a small, 38 bed, nursing home in

Shreveport. After several months in that job, she transferred to a larger home operated by the same owner. After a total of seven months experience with that company, Ms. Goostree accepted employment with another nursing home organization. In 1976, she was administrator at two different homes in Louisiana owned by her new employer. In May 1977, the plaintiff inquired about openings in Montgomery County, but none existed at that time.

When attending her family reunion in July, 1977, Ms. Goostree discovered Jarrell had submitted his resignation and she began to actively pursue the position at the Home. Having worked in a Congressional office and having aided her brother who had served as mayor of Clarksville, the plaintiff was well-versed in the art of politics. When the plaintiff learned that the Committee would hire Jarrell's replacement, she began contacting the members. She was assured that the most qualified applicant would be hired.

Ms. Goostree also called on Judge Beach and he assured her that VanMeter was not being "groomed for the job," and reaffirmed that th best qualified applicant would be appointed. At this time, the plaintiff knew that VanMeter was not licensed as an administrator and she knew that pursuant to Tennessee's reciprocity provision she was qualified for a Tennessee license.

VanMeter had been under the impression that Jarrell would retire in 1978 and was taken by surprise when the administrator announced his October retirement on June 30, 1977. VanMeter had been taking correspondence courses to prepare himself for the licensing procedure. He quickly completed the courses and made plans to take the examination on September 27, 1977, four days before Jarrell's retirement date, but after the selection process by the Committee had been completed.

VanMeter was forty-four years of age in 1977 and had retired from the United States Army

after twenty years of service. He was drafted into the service as a private-trainee and rose to the rank of sergeant major. He had no training or background in health matters other than the rudiments of first aid, but had considerable administrative experience. At the end of his military career, VanMeter held the highest enlisted rank in the Army. He had at one time been sergeant major on the presidential flight detachment with the responsibility for security, maintenance and staffing for the helicopter support for the President of the United States. At another time, he was operations officer for Army aviations with administrative duties in a section consisting of two thousand helicopters and two thousand men. VanMeter had extensive experience in the preparation of budgets and the maintenance of records.

When he retired from the military in 1976, VanMeter began seeking employment in the Clarksville area. In the course of his army career he

had met Mercer McKinney, who is also an Army retiree. The two had served together at Fort Campbell in 1960. VanMeter had heard that there was a vacancy in the assistant administrator's position and knew that McKinney was on the Committee. McKinney recommended the Home as a place of employment and suggested to VanMeter that he contact Jarrell. VanMeter was interviewed three times by Jarrell in the spring of 1976. At the end of June, Jarrell offered him the position. The incumbent was discharged effective the last day of July and VanMeter assumed the assistant administrator position on August 1, 1976. His job performance was satisfactory and VanMeter became interested in succeeding Jarrell as administrator when he retired. VanMeter knew that Jarrell planned to retire in 1978, but health problems caused the administrator to advance his retirement date to October 1977. VanMeter also knew that the Committee, not Jarrell, would hire the new administrator.

The Committee scheduled interviews on August 28, 1977. There were six applicants for the position, two or whom were female. Three applicants were invited to be interviewed, but one did not show up, that left Goostree and VanMeter as the only prospects. After the interviews, the Committee voted. Ms. Collier voted for Goostree and McKinney and Hunt voted for VanMeter. The Committee did not make its decision public. Neither did the Committee inform Judge Beach at the time because he was out of town.

The plaintiff learned about the decision through informal channels and complained to Judge Beach as soon as he returned to town. She took the position that of the two final applicants, she was the only one that was legally qualified. She contends that she was licensed by Louisiana as an administrator and was therefore eligible to be licensed by Tennessee by simply following through the technical application

procedures. This, she said, could easily be accomplished by October 1. VanMeter, on the other hand, was unlicensed and could not be licensed by October 1.

Judge Beach responded to the situation by declaring to Ms. Goostree that the selection process would be fair and proper. He then contacted the Committee and requested that they set aside the selection and conduct a second interview session when he could be present. The Committee agreed to set aside their first decision and a meeting was scheduled for September 7, 1977. Judge Beach also instructed Mike Allen to review the license requirement for the Nursing Home Administrator position.

VanMeter was not informed that he had been selected at the first interview. Because of his concern about being legally qualified to assume the administrator duties on October 1, he called Health Care Facilities licensing office and talked to George Watson, who was the chief of Health

Care Facility Licensing of the Division of Health Care Facilities of the Tennessee Department of Public Health. VanMeter told Watson that he was qualified to take the examination for the license, but the September 27 test would not be given until after the Committee made its second selection. On September 2, 1977, Watson informed VanMeter in writing that the Board for Licensing Health Care Facilities would accept for a reasonable period of time an unlicensed interim administrator provided that person was in the process of obtaining the license and provided the Home was operated in a satisfactory manner. Watson's letter also stated that it appeared to the Board that the Home was being operated in a satisfactory manner, thus no action would be taken concerning the Home prior to the determination of VanMeter's license. When the plaintiff discovered that Watson had written the letter to VanMeter, she went to Nashville to complain. Watson told her that he was not involved in the

selection process, but he saw no problem with the tentative selection of VanMeter contingent upon his receiving his license.

The day before the second interview session, Ms. Goostree returned to Nashville to inquire about her license. Officials at the licensing division for nursing home administrators informed her that her license would be issued with the effective date of September 6, 1977, and she was given the serial number that would appear on the license. Ms. Goostree actually received a copy of her license on October 4, 1977.

Following Judge Beach's instructions, Mike Allen had investigated the licensing problem. After travelling to Nashville and conferring with the appropriate state officials, Allen became concerned about the legality of the Committee selecting an unlicensed person as the Home Administrator pending the results of the licensing exam. Allen concluded that such an appointment could be made on an interim basis as long as the

Committee realized that if the unlicensed interim Administrator was unsuccessful on the exam, then the Committee would have to commence a new selection process. Allen informed Judge Beach of his opinion.

The second time around, eight people made application to the Committee for the Home Administrator position, six were invited to the interview session and four appeared. Of the four, the plaintiff was the only female. Present and participating in the process along with the members of the Committee were Judge Beach and Mike Allen. The Committee had prepared a set of questions that were asked of each candidate. Following the formal interviews, the Committee held discussion and then voted. McKinney and Hunt supported VanMeter and Collier supported another male applicant. When the official vote was taken, Collier joined the other two in order that the selection be unanimous. Allen and Beach agreed with the Committee's choice.

VanMeter, along with his military experience, had a successful year as assistant administrator at the Home. He had been highly recommended for selection by the physician at the Home, the nurse consultant and the retiring administrator. Ms. Goostree, on the other hand, at age 65, had worked four years in clerical positions while her husband was alive, and in the past three years had spent about 30 months working as an administrator in four different nursing homes in Louisiana. Also, VanMeter was licensed to operate the waste water facility on the grounds of the Home. The members of the Committee insisted that this qualification was not tailored to fit VanMeter to the job, but was entirely reasonable. If no one at the Home held the waste water license, the Home would have to contract with a private business to have the daily tests performed that are required by state law. Although the plaintiff did not satisfy that qualification, it is foreseeable that she could have

obtained the appropriate license without undue difficulty.

VanMeter took the examination for the administrator's license on September 27, 1977 and was certified on November 1, 1977. Although Jarrell returned on October 1, 1977, he was hired by the Committee as a part-time "consultant." He was at the Home two days a week and in this manner the Home was able to have a licensed administrator on duty until VanMeter was certified.

II.

The plaintiff seeks relief for unlawful gender base employment discrimination under Title VII, which tolerates no discrimination. She proceeds under disparate treatment and disparate impact theories. Both of which require that the plaintiff establish a prima facie case, that the defendants rebut that prima facie case by articulating a legitimate non-discriminatory reason for the

challenged employment action; after which, the plaintiff may prove that the defendant's rebuttal is a pretext for discrimination. U.S. Postal Service Board of Governors v. Airkers, ___ U.S. ___, 103 S.Ct. 1478, 1481-82; Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). The ultimate burden of proving the existence of intentional gender base discrimination by the defendants is at all times on the plaintiff. Burdine, 450 U.S. at 253.

Reviewing the proof under the disparate impact theory, this Court find no policy or practice utilized by the defendants that, although gender neutral on its face, has an adverse impact on females. To the extent, the plaintiff argues that the guidelines adopted by the Committee were tailored to favor male over female applicants, this Court does not find that the plaintiff has in any manner proved that the

defendants' guidelines had an impact, disparate or otherwise, on females. Therefore, the Court concludes that the plaintiff has failed to show a violation of Title VII under the disparate impact theory. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Under the disparate treatment theory, it is apparent that the plaintiff has established a prima facie case of discrimination. The plaintiff proved that she is a female citizen of the United States, she applied and was qualified for the position of Home Administrator for which the defendants were seeking applicants and that despite her qualifications she was rejected in favor of VanMeter, a male. McDonnell Douglas Corp., 411 U.S. at 802. Establishing a prima facie case creates a presumption of discriminatory action by the defendants. The defendants, however, have presented a legitimate non-discriminatory reason for the plaintiff's non-selection that rebuts the presumption of discrimination.

The defendants have presented evidence showing that VanMeter was favored over the plaintiff because of his prior supervisory and administrative experience and his successful performance as acting administrator of the Home prior to the defendants' selection of a permanent Administrator. The proof substantiates the defendants' evaluation of VanMeter's prior experience and performance. Moreover, this Court finds that reason credible and sufficiently clear and specific to qualify as a legitimate non-discriminatory reasons. Grano v. Department of Development of City of Columbus, 699 F.2d 836, 836 (6th Cir.1983).

Having rebutted the plaintiff's prima facie case through articulation of legitimate non-discriminatory reason for the plaintiff's non-selection, the Court's focus now turns to whether the plaintiff has shown pretext. The relevant inquiry is whether the reason proffered by the defendants for the plaintiff's non-selection are a

cover-up for illegal gender base discrimination. The major pretext contention of the plaintiff is that the defendants' selection of VanMeter was not based on his experience and prior performance, but was illegal because it violated the Home policy and Tennessee and Federal requirements that the Administrator have a license. The plaintiff further reasons that because she was the only applicant with a license, the defendants' selection of VanMeter was clearly illegal and based upon his gender.

To be sure, the proof shows that when the plaintiff applied for the position, she had her Louisiana administrator's license and was eligible to receive her Tennessee license by virtue of a reciprocity agreement between Tennessee and Louisiana. On the day of the defendants' final interview, the plaintiff was issued her license number by the State Board for Licensing Administrators and received her actual license on or about October 11, 1977. Of the four applicants

interviewed at the final interview session, only the plaintiff had her license number.

The license requirement, however, was one of several requirements for the Home Administrator's position. The defendants' decision to appoint VanMeter as interim Home Administrator was based upon the opinion George Watson, Chief of Health Care Facilities, Licensing Division of Tennessee Department of Public Health, that the defendants could make a temporary appointment pending VanMeter's successful completion of the licensing exam. The defendants relied on Watson's opinion in order to comply with state and federal licensing requirements and not to accomplish some discriminatory purpose. Clearly, VanMeter was actively pursuing obtaining his license and because of his satisfactory performance at the Home and prior experience, the defendants chose to hire VanMeter pending the results of the licensing exam. The appointment of VanMeter was temporary and would not

rise to a permanent appointment if he was unsuccessful on the exam. VanMeter's non-receipt of a license would result in a new Administrator and the Committee's reconsideration of all the applicants.

Given these facts, this Court does not believe that the defendants selected VanMeter as a result of intentional sex discrimination against the plaintiff. The plaintiff has failed to prove pretext in the defendants' selection of VanMeter due to his prior experience and successful performance. Thus, the Court concludes that the plaintiff has failed to show intentional gender based discrimination in the defendants' failure to select her for the Home Administrator position. Having found no violation of Title VII, judgment will enter for the defendants in an appropriate ORDER.

Entered this the 31st day of May, 1984.

/s/ John T. Nixon
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

SARAH GOOSTREE	)	
	)	
VS.	)	DOCKET NO. 78-3372
	)	
STATE OF TENNESSEE; MONTGOMERY COUNTY QUARTERLY COURT; MONTGOMERY COUNTY QUARTERLY COURT NURSING HOME COMMITTEE; WILLIAM O. BEACH; ARTHUR HUNT; MERCER McKINNEY; LORENZA COLLIER; MIKE ALLEN; RAYMOND F. JARRELL; DON R. VANMETER and GEORGE WATSON	)	

ORDER

Pursuant to the contemporaneously filed Memorandum of Law issued this day in the above-styled case, judgment enters for the defendants and this case is DISMISSED.

Entered this the 31st day of May, 1984.

/s/ John T. Nixon
United States District Judge

Supreme Court, U.S.
FILED
FEB 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1165

In the Supreme Court of the United States

OCTOBER TERM, 1986

SARAH M. GOOSTREE,
Petitioner,

vs.

MONTGOMERY COUNTY QUARTERLY COURT, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF THE CASE

Petitioner filed her lawsuit pursuant to 42 U.S.C. §1983 and 1985(3) *inter alia,* claiming that she had been discriminated against due to her sex by the refusal of the Montgomery County Quarterly Court Nursing Home Committee to select her as the Administrator of the Montgomery County Nursing Home. The Nursing Home Committee was composed of two males and one female, all of whom were elected officials of Montgomery County, Tennessee. Ms. Lorenza Collier, the female member of the Committee, was not simply dismissed by the District Court from the case but was dismissed at the request of Plaintiff on the morning of the trial, leaving the two male members of the Committee as Defendants.

At the request of Plaintiff, the trial was held before a jury, pursuant to 42 U.S.C. §1983. Two days prior to trial, Plaintiff amended her Complaint to add a claim that Defendants violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), et seq. by discriminating against her due to her sex. The jury trial lasted fifteen days and, at its conclusion, the jury returned a general verdict in favor of Defendants, in effect finding that Plaintiff was not discriminated against due to her sex. Since Plaintiff was not entitled to a trial by jury on her Title VII claim, that issue was reserved for the Trial Judge, who concluded that Plaintiff had failed to prove pretext and had failed to show intentional gender based discrimination in the Defendants' failure to select her for the Nursing Home administrator position.

The case was appealed to the United States Court of Appeals For the Sixth Circuit which noted that the evidence in the case was conflicting and subject to variable interpretations but that it could not say that the District

Court clearly erred in finding that the Defendants did not act with the statutorily prohibited animus in rejecting Petitioner for the job. The particular matters about which Petitioner complained in the selection process were numerous. The resolution of these matters involved the credibility of witnesses, which both the jury and the Trial Judge resolved in favor of Defendants.

Mr. Raymond Jarrell, the retiring Administrator, had been Administrator of the Home since it was formed in the late 1950s. He had responsibility for all of the employees at the Home, including the hiring and firing, but he had no responsibility for the selection of his replacement. The position of Assistant Administrator was created in 1975 in order to assist Mr. Jarrell in carrying out the duties of the Administrator, due to the rising demands of the job. At one point, Mr. Jarrell offered this Assistant Administrator position to Mary Woodall, a registered nurse, the nurse consultant at the Home, and also a female. She declined the job.

While there was testimony that Mr. Jarrell had made statements about the Administrator position being "a man's job", this testimony was seriously disputed. Mr. Jarrell had no authority or responsibility for hiring the Administrator so the statement had limited relevance. He denied ever having made such a statement and he actually offered the Assistant Administrator position to a woman. The testimony was offered by Mrs. Goostree and a male Assistant Administrator who was terminated. Both of these individual's credibility was called into question. Petitioner told the Committee in her interview that she had never been terminated from any job and she also testified on the witness stand that she had never been terminated from a job. Rebuttal testimony was presented in which her

supervisors at every nursing home position which she had held testified that they had terminated her for various reasons, all reflecting on her competency and ability. She had never held a nursing home position from which she was not terminated.

There was substantial and material evidence that the guidelines were not tailored for Mr. VanMeter and that the Committee was looking for the most qualified candidate for the opening. There was substantial and material evidence that Mr. VanMeter was not preselected for the position and that the sex of the applicant was not a factor in the Committee's decision. The guidelines for the Administrator position were definitely job related and, indeed, were job specific. There was substantial and material evidence that Mr. VanMeter was the most qualified applicant and members of the Committee testified why they deemed Mr. VanMeter the most qualified. The jury found for Defendants on December 23, 1980 and the District Court found for Defendants on Plaintiff's Title VII claim on May 31, 1984.

The Sixth Circuit Court of Appeals affirmed the District Court as to the discrimination issues because the findings were not clearly erroneous, their resolution involved matters of credibility and because there was little evidence from which to conclude that sex was a basis for any preferential treatment.

REASONS WRIT OF CERTIORARI SHOULD BE DENIED

There are none of the reasons present in the instant case which constitute the type or character of reasons that generally are considered in granting a writ of certiorari. The instant case primarily involves the resolution of factual issues and, most definitely, determinations regarding the credibility of witnesses. Both the jury and the Trial Judge found that Plaintiff had failed to show intentional, sex based discrimination in Defendants' failure to select her for the Administrator position.

The United States Court of Appeals for the Sixth Circuit saw no reason to disturb those findings and in so doing, this decision of the Court of Appeals is not in conflict with the decision of any other Federal Court of Appeals on the same matter, nor is it a departure from the accepted and usual course of judicial proceedings. Further, the issues raised in this case and in this Petition do not involve important questions of federal law which should be settled by this Court, nor does the case involve an important federal question that has been decided in a way which conflicts with applicable decisions of this Court. Therefore, Respondents respectfully urge that the writ of certiorari be denied.

The issues involved herein primarily were factual ones and there was substantial and material evidence from which the jury and the Trial Judge could determine that Plaintiff was not discriminated against due to her sex. Plaintiff's pretext argument was forcefully presented to the jury and to the Trial Judge. The conclusion reached by both triers of fact was that sex was not the basis for any preferential treatment.

I. The Question of "Pretext" Is a Fact Question Resolved in Respondents' Favor by Both the Jury and the Trial Judge.

The Montgomery County Nursing Home is an indigent care nursing home located in a rural area in Montgomery County, Tennessee. It is owned and operated by Montgomery County through its elected representatives, including, at all relevant times herein, the County Judge, William O. Beach, and the Montgomery County Quarterly Court which, in 1978, was renamed the Montgomery County Board of County Commissioners. Three members of the Quarterly Court constituted a Nursing Home Committee which was responsible for the nursing home and, at all relevant times herein, that Committee was composed of Chairman Arthur Hunt, an elderly vocational guidance counsellor who had been employed at a local high school for 27 years, Mrs. Lorenza Collier, a black housewife, and Mercer McKinney, the owner and operator of a local flower shop. Sixty of the sixty-five employees at the home were female and ten of the thirteen supervisory employees were female.

In 1975, Mr. Raymond Jarrell, who had been the Administrator of the nursing home for approximately twenty years, obtained permission to hire an Assistant Administrator in order to help him with the increasing workload, primarily brought about by the increased paperwork required due to government regulations. Mr. Jarrell hired a male as the first Assistant Administrator but this person resigned after approximately one year to accept another opportunity. Mr. Jarrell then offered the position of Assistant Administrator to Mrs. Mary Woodall, the nurse consultant at the home and a female. She refused the position and another male was hired. Although, this in-

dividual had a Nursing Home Administrator's license he simply could not handle the position and was terminated. Mr. VanMeter was hired as the Assistant Administrator by Mr. Jarrell in August, 1976.

Mr. Jarrell was the one whom Petitioner, the terminated Assistant Administrator and a third individual whom Mr. Jarrell did not even recall talking with except in an interview for the Assistant Administrator position, accused of having made statements that it was "a man's job." Mr. Jarrell denied ever making that statement. He had no responsibility for selecting the Administrator of the Home. He had offered the Assistant Administrator position to a female. All of these facts were before the Court and the jury and the credibility of the witnesses as well as the weight of the testimony was in issue. Petitioner had told the Committee in her interview that she had never been asked to resign from a job and she so testified on the witness stand. Rebuttal testimony was presented by Petitioner's two supervisors at all of her prior nursing home positions who testified that they had terminated her for various reasons, all reflecting on her competency and ability. She had never held a nursing home position from which she was not terminated.

The Trial Judge did not permit much of this rebuttal testimony to be heard by the jury, since the Committee was not aware of these facts before they made their selection. There was substantial, credible testimony, however, from the Committee members as well as from Judge Beach and the director of personnel for the County, both of whom attended the final interviews, that Petitioner's responses to the interview questions, which were asked of all candidates, were not nearly as specific as other candidates and that she did not demonstrate in her interview

the knowledge, ability or qualifications that was demonstrated by Mr. VanMeter, or other candidates, for that matter.

Mr. Jarrell had planned to retire in the summer of 1978 but, due to his failing health, submitted his resignation letter to Judge William O. Beach on June 30, 1977. The Nursing Home Committee began the process of hiring a replacement for Mr. Jarrell. The Committee formulated its own guidelines or qualifications for the position, although there were two other job descriptions in existence. This became the focal point for argument on behalf of Petitioner that the guidelines were formulated and tailored to fit Mr. VanMeter resulting in his preselection for the position.

Petitioner argued that the Committee revised the guidelines previously prepared by Mr. Jarrell which read, *inter alia*, "Must fulfill license requirement of this State", to read, "Possess or be in the process of obtaining a nursing home administrator license from the State of Tennessee". Neither VanMeter nor Petitioner held a Tennessee Nursing Home Administrator's License at the time these guidelines were drafted, nor at the time they applied for the position, although Petitioner was entitled to receive a Tennessee license by virtue of reciprocity. Mr. VanMeter, who was caught by surprise with Mr. Jarrell's early retirement announcement, was not able to take the nursing home administrator test prior to the interview or selection, since it was not even offered until late September, or after the selection was made. The Committee's explanation for this guideline was that it would encourage persons from out of state, like Petitioner, as well as persons like VanMeter to apply. Montgomery County, of which Clarksville is the County Seat, is located next to the State of Kentucky.

Petitioner also argued that the guideline drafted by the Committee requiring a candidate to possess or be in the process of obtaining a Water and Waste Water License from the State of Tennessee was tailored to fit Mr. VanMeter, since she did not have the experience. There was considerable and substantial evidence from which the triers of fact could conclude that a Water and Waste Water License was most desirable and would result in significant savings to the nursing home and, in fact, Mr. Jarrell held that particular license. Petitioner argued that there was a one year waiting requirement in order to obtain that license and, therefore, Mr. VanMeter was the only one who could realistically benefit from that requirement. The Committee all testified that they were not aware of the one year waiting requirement and that they assumed Mrs. Goostree could obtain this license as easily as any other applicant, that she was deemed to have satisfactorily met this particular guideline and it resulted in no favoritism to any candidate. There certainly was no evidence that males could obtain this license any more quickly or easily than could females. In fact, the female Administrator of a similar nursing home in an adjoining county testified that she held that license for her nursing home. Further, the waiting requirement could be waived.

Petitioner also argued that the maintenance and security guidelines drafted by the Committee indicated preferential treatment to males. This was a fact question and there was substantial evidence to support both the jury's and the Trial Court's determination that these particular guidelines were not intended to, nor did they result in, preferential treatment to males. For instance, Mr. Jarrell was elderly and in failing health and performed virtually none of the maintenance, nor was he able to "stand guard over" the nursing home. The Committee

explained that they were looking for someone who could see that the maintenance and security were accomplished. There were two maintenance men employed at the facility plus the major maintenance was performed by outside contractors. There had been security problems at the facility, primarily patients wandering off into the nearby woods, and there was substantial evidence that security was important. These guidelines were both job related and job specific.

Petitioner's initial contention was that the Committee should have used one of the two existing guidelines and should not have prepared its own. Actually, they all were quite similar. Petitioner contended that the Committee should have used a job description which had been prepared by Mr. Michael Lutche, who had been employed by the State of Tennessee Personnel Department in the office of Local Classification and Compensation Services. Petitioner called Mr. Lutche as a witness but, on cross examination, he testified that, based upon the information available to the Committee, Petitioner did not meet the qualifications set forth in his guidelines. Mr. Lutche also testified that, except for the license, Mr. VanMeter met all of the objective qualifications. Mrs. Goostree was lacking in education and experience whereas Mr. VanMeter only was lacking his license and he was scheduled to take the test as soon as it was offered by the State.

Mr. VanMeter had done a most commendable job during his approximately one year as Assistant Adminstrator. He acquired the love and respect of the patients and the staff. Thus, when Mr. Jarrell announced his retirement and the Committee began looking for another Administrator, Mr. VanMeter had the support of the Nursing Home staff, patients, and physician, as well as Mr. Jar-

rell. Letters of recommendation were written on his behalf by the Nurse Consultant at the Home, the physician of the Nursing Home, the pharmacist and the Administrator, Mr. Jarrell. A logical conclusion, but not the only conclusion, from all of this evidence is that Mr. VanMeter had the "inside track" for the position because he was a known quantity who was doing an excellent job as Assistant Administrator and who had demonstrated potential and ability with regard to performing the job of Administrator. It had nothing to do with his sex.

Plaintiff argued that the selection of a former Sergeant Major in the Army to be the Nursing Home Administrator is, in itself, an indication of sex discrimination. Plaintiff, however, in so doing engages in a bit of sexual stereotyping herself. This particular Sergeant Major was extremely competent in handling the administrative duties and in supervising the personnel and was very much loved and admired by the patients. To the contrary, Plaintiff had been fired from every Nursing Home position she had ever held for various reasons, one of which was the inability to get along with the patients or their families. Plaintiff argued that the job guidelines, as developed by the Committee, were tailored to fit Mr. VanMeter. There was substantial, material evidence from which the jury and the Trial Judge could determine that either the guidelines were not tailored to fit Mr. VanMeter or, that the guidelines did not have an impact, disparate or otherwise, on Petitioner.

The guideline pertaining to the requirement for a Nursing Home license, when the guideline was adopted, benefited Ms. Goostree as much as it did Mr. VanMeter, because she did not have her Tennessee license either. The jury and the Trial Judge had the opportunity to observe the cred-

ibility and demeanor of the Committee as they explained each guideline, the reasons therefor and their interpretation thereof. The waste water license guideline also favored neither males nor females. The Committee knew that the Nursing Home was able to save money because Mr. Jarrell held the waste water license required by the State of Tennessee. If no one held the license, an outside contractor had to be hired. The Committee did not know what the specific requirements of the license were; the Committee was merely stating to the applicants that, if they did not have this license, they should be in the process of obtaining it. Neither Mr. VanMeter nor Ms. Goostree had this license and it was no more difficult for a female than for a male to get.

The guidelines simply were not designed to favor any male applicant over a female applicant. They were not sex related and they certainly were job specific. A conclusion that could be reached is that the guidelines were drafted with Mr. VanMeter in mind in order to favor his selection as the Administrator, not because he was male, but because he had performed so well as the Assistant Administrator. The conclusion also could be reached that the guidelines were drafted by the Committee without regard to sex as part of what they saw to be their responsibility and that the guidelines were their effort to set forth in terms which they understood the qualifications they were looking for in the new Administrator. Members of the Committee testified that the waste water license requirement, the maintenance requirement and the security requirement did not cause Ms. Goostree unfavorable consideration in the final analysis. The Committee members assumed that she could supervise the maintenance chores, that she could supervise the security of the Home and that she could obtain a waste water license.

In short, there was evidence of preselection and there was evidence of no preselection. The evidence of preselection is not nearly as clear as Plaintiff or the Sixth Circuit Court of Appeals seems to suggest. As the Sixth Circuit noted, however, regardless of the question of preselection, there was virtually no evidence that any preselection that occurred was the result of sex discrimination or that the Committee favored Mr. VanMeter because he was a male. There was substantial, material evidence, that the Committee favored Mr. VanMeter because of his qualifications.

In a recent sex discrimination case, this Court held that, if the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. If there are two permissible views of the evidence, the fact finder's choice cannot be clearly erroneous. *Anderson v. City of Bessemer*, 470 U.S. ....., 106 S. Ct. ....., 84 L.Ed.2d 518, 528 (1985). In its review of the instant case, the Sixth Circuit Court of Appeals did not even suggest that it would have weighed the evidence differently and it is submitted that any individual(s) who sat as fact finder at the trial of this cause would have reached the same conclusion as the jury and the Trial Judge. The evidence cried out for only one conclusion to those who had the opportunity to both see and hear it presented.

This Court stated in *Anderson*:

> "The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The

> trial judge's major role is the determination of fact, and with the experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost and diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be the 'main event' . . . rather than a 'tryout on the road.' "

Anderson, supra, 84 L.Ed.2d at 529.

It is submitted that the question of whether an employer's explanation is pretextual or not is a question of fact and, although there may certainly exist situations where there is only one permissible view of the evidence, the instant case is not such a case. The factual inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff. *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715, 103 S. Ct. 1478, 75 L.Ed.2d 403, 410 (1983); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L.Ed.2d 207, 215 (1981). The plaintiff retains the burden of persuasion.

In the instant case, Respondents produced evidence that Mr. VanMeter was selected instead of Petitioner for legitimate nondiscriminatory reasons. Petitioner had the opportunity to demonstrate that Respondents' proffered reasons were not the true reasons for her rejection. Petitioner had the opportunity to persuade the jury and the

Court that a discriminatory reason more likely motivated the Committee or that the Committee's proffered explanation was unworthy of credence. *See, Burdine, supra,* 450 U.S. at 255-256. In short, the Trial Judge, and the jury in this case, had to decide which party's explanation of the Committee's motivation it believed and both selected the Committee's version. *See, U.S. Postal Service Board of Governors v. Aikens, supra,* 460 U.S. at 716.

It is also submitted that the Sixth Circuit's suggestion that the evidence clearly suggests that preselection occurred is a permissible view of the evidence that is most definitely not the only permissible view of the evidence. There was substantial and material evidence that the Committee, Judge Beach and Mike Allen considered the qualifications and the experience of each applicant, without regard to sex, prior to reaching its decision and that Mr. VanMeter was found to be the most qualified without any preselection. Further, if preselection means that a candidate who is known and respected is favored over another candidate whose credentials or qualifications are not as well known, then preselection is a widely utilized practice that does not violate Title VII, provided there is no illegal discriminatory animus.

Petitioner had virtually no work experience prior to the work as a nursing home administrator which she listed on her application. The Committee noted that she had worked in several different Homes over a period of approximately two-and-one-half years which indicated that she had no lengthy experience in any one Home. The Committee noted that she worked in corporate nursing homes which indicated to the Committee that she had limited experience and skill in the administrative areas of managing a nursing home because these particular functions are handled at the corporate level by corporate

owned Homes. This was in contrast with Montgomery County Nursing Home where the Administrator had responsibility for everything, including preparing the budget, complying with governmental regulations, preparing governmental reports, and other administrative, as well as operational, areas in which Petitioner obviously had very little experience and skill. The Committee noted that Mr. VanMeter had extensive experience in personnel supervision and administrative matters including reports and budgets and that Mr. VanMeter had worked as an Assistant Administrator for approximately one year under Mr. Jarrell in preparing the budget, reports and all other matters. The Committee also noted that Mr. VanMeter had the respect of the staff and had demonstrated a very caring and loving attitude and concern for the patients.

It is submitted that the Committee's explanation for their reasons for selecting Mr. VanMeter were not pretextual and it is most definitely submitted that Mrs. Goostree's qualifications were not better than those of Mr. VanMeter. Regardless of one's conclusions with regard to those assertions, these are factual matters which were best resolved by the Trial Court and the jury.

The Trial Court was well aware that Plaintiff did not need to show direct evidence of discrimination in order to prove her claim and the jury was so instructed. The Trial Court rendered its judgment on the jury verdict in the 42 U.S.C. §1983 claim and, after a lengthy period of time, the parties submitted their findings of fact and conclusions of law to the court. The findings and conclusions submitted by Respondents were not adopted verbatim and, indeed, much of Respondents' findings and conclusions were omitted or revised. The question of "pretext" or whether Respondents' explanation of its actions was pretextual is a question of fact for the jury and the Trial Court, both

of whom resolved the question in Respondents' favor. It is neither clearly erroneous nor should it be treated as a matter of law.

II. The Causation Standard Was Properly Applied.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et seq., makes it an unlawful employment practice for an employer to discriminate against any individual "because of" such individual's sex. 42 U.S.C. 2000(e)-2. This Court previously has stated that no more is required to be shown by a plaintiff than that the illegal discriminatory animus is a "but for" cause. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n. 10, 96 S. Ct. 2574, 49 L.Ed.2d 493 (1976). Therefore, if plaintiff cannot show that any illegal animus is a "but for" cause, then Respondents' selection is lawful.

Further, both the Trial Court and the Court of Appeals certainly understood that sex does not have to be the sole reason for Petitioner's rejection. The Trial Court's charge to the jury included both those instructions set forth in the Sixth Circuit Court of Appeals' Opinion and other instructions and the instructions did not have any tendency to confuse or mislead the jury with respect to the applicable principles of law. Further, the instructions indicate that the Trial Court fully understood that sex did not have to be the sole reason for the rejection.

As the Sixth Circuit noted, Petitioner has never suggested, prior to now, that this is a dual motive case or a case in which direct evidence of discrimination is available. Petitioner's dual or mixed motive argument is being raised for the first time in her Petition to this Court. In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977),

this Court addressed the dual motive situation in a first amendment case. This Court held that the initial burden of proof was on the Plaintiff to show that his conduct was protected and that the protected conduct was a substantial or motivating factor in the decision not to rehire him. Once the Plaintiff establishes that the protected conduct was a motivating factor in the employer's decision, the burden of persuasion shifts to the employer to demonstrate that Plaintiff would not have been hired regardless of the protected conduct. This Court observed that a Plaintiff should not be placed in a more favorable position than he would have occupied without the protected conduct.

In addition to the fact that Petitioner raises this argument for the first time in this Court, Petitioner was unable to carry her burden of establishing that sex was a "but for" factor in the decision. Petitioner's approach would require Respondents to assume the burden of proof and persuasion to show that they would have made the same decision absent sex discrimination, when they have already proved that sex discrimination was absent, anyway. If Petitioner had been successful in her efforts to prove that, but for sex discrimination, she would have been selected, Petitioner would have won her case regardless of the dual motive approach.

CONCLUSION

It is respectfully urged that the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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